ADDITIONAL VIEWS
H.R. 3209, THE "ANTI-HOAX TERRORISM ACT OF 2001"

We support the effort to punish people who perpetrate hoaxes involving biological, chemical, or nuclear materials or other weapons of mass destruction; in this time of national crisis, it is outrageous for any individual to take advantage of our collective anxiety about terrorist acts.[1] Clearly, we must act to provide law enforcement with the tools it needs to address this problem.[2] For that reason, we support H.R. 3209, the "Anti-Hoax Terrorism Act of 2001," which creates a Federal criminal penalty and a civil cause of action to convey intentionally any false information about a threat involving biological, chemical, or nuclear weapons or weapons of mass destruction. We are submitting these additional views, however, because we believe H.R. 3209 is unintentionally drafted too broadly and because it imposes mandatory restitution in criminal cases. We hope these matters can be addressed as we move to the floor or resolve differences with the Senate.

The bill, as currently drafted, would make it a Federal crime to engage in "any conduct" (1) "with the intent to convey false or misleading information under circumstances where such information may reasonably be believed," and (2) where the information concerns an activity which would violate Federal law with respect to chemical weapons, biological weapons, nuclear materials, or weapons of mass destruction. This offense would be punishable by a fine, imprisonment of up to five years, or both. In addition, the bill makes the individual who conveys such information subject to a civil action for emergency or investigative responses incurred as a result of responding to the false information. Finally, the bill requires the court to order a person convicted of this Federal crime to pay restitution. The person would be jointly and severally liable for restitution, and the restitution would be treated as a civil, rather than a criminal, fine. The following is a description of the concerns we would hope could be addressed before the bill is signed into law.

I. OVERBREADTH

---

[1]There has been a recent rash of anthrax hoaxes, where one or more persons have decided to intimidate others by sending powder through the mail purporting to be anthrax, but later determined to be harmless. A large portion of recipients of such letters have been abortion clinics and pro-choice groups; in fact, over 280 clinics have been threatened since the initial outbreak. Dennis B. Roddy, *Anthrax Threats Target 2 Abortion Providers Here, Others in East*, PITTSBURGH POST-GAZETTE, Nov. 9, 2001, at A11. In a recent incident, a perpetrator used Federal Express to send powder and a threatening note to a pro-choice group and went so far as to forge the billing numbers and return addresses of the groups themselves. *Id.*

[2]While Federal authorities do have some tools available against such offenders, *see* 18 U.S.C. § 876 (penalties for mailing threatening communications), we have heard the call of clinics and other targets that additional legislation is needed to fill gaps. *See, e.g., Planned Parenthood Voices Support for Anti-Terrorism Bill*, Press Release (Nov. 15, 2001) ("We are pleased to see Congress is considering stiffer penalties for people who commit such acts.").

Whenever we create new criminal penalties, we must do so in a measured and reasonable manner. That is why Rep. Sheila Jackson Lee (D-TX) offered an amendment at the Committee's markup to require the government to prove that the hoax was perpetrated with "malicious" intent.[3]

We believe that the bill as written could go too far because it does not require that the offenses be committed with such intent. First, the legislation could result in Federal prosecutions of individuals who simply disseminate erroneous information about potential acts of terrorism. For example, a chain e-mail recently was circulated that purported to contain credible information that terrorist acts involving anthrax would occur in shopping malls on October 31, 2001. Such acts did not occur. Under a strict reading of this bill, an individual who forwarded that e-mail knowing it to be false, but could reasonably be believed, would be subject to Federal prosecution.

Also subject to Federal prosecution would be incidents that amount to nothing more than mere jokes. It has been reported that there is almost a national "epidemic" of people who are sending or giving powder to friends or coworkers to give a temporary scare about anthrax but not intending ill will.[4] Furthermore, it should come as no surprise that there are teenagers out there who have not learned better and engage in simple pranks just to scare friends.[5] While we believe that this demonstrates poor taste and bad judgement, we do not believe it should be subject to Federal prosecution.

The Majority's response essentially has been to concede that this reading of the bill is correct but we should simply trust that Federal prosecutors will exercise their discretion and avoid prosecuting such cases. While it is true that most prosecutors will refrain from prosecuting incidences involving misguided pranks or bad jokes, we already are seeing that, in the current atmosphere, there are prosecutors who will bring such cases.[6] Congress should preclude such overzealous prosecutions through more narrowly-tailored language in this bill.

Third, despite the gaps we acknowledge exist in current Federal law, there are some remedies available to law enforcement against serious offenses. For instance, some state

---

[3]Requiring the government to prove the conduct was intended maliciously would have provided a parallel with the *mens rea* requirement of similar legislation introduced in the Senate by Sen. Patrick Leahy (D-VT), Chairman of the Senate Committee on the Judiciary. *See* S. 1666, the "Anti-Terrorist Hoax and False Report Act of 2001," 107th Cong., 1st Sess. § 2 (2001). Unfortunately, the Jackson Lee amendment was defeated by voice vote.

[4]Susan Levine, *Disseminating Dread; Pranksters, Disgruntled Americans Perpetrate Hoaxes*, WASH. POST, Oct. 26, 2001, at A1.

[5]*Id.*

[6]*Id.*

authorities already have begun criminal investigation and prosecutions against persons whose hoaxes were so egregious that they crossed the line.[7] In addition, numerous employers have fired employees who engaged in such acts.[8] These examples show that the congressional response to the hoax epidemic does not need to address each and every scare; instead, it can and should be narrowly tailored to the most egregious cases.

Unfortunately, the Majority opposed the amendment on the grounds that it would render the legislation meaningless. The rationale was that "malicious" means "intending to cause harm" and that perpetrators could argue it is clear they did not intend to cause harm because they did not send real anthrax. This argument is flawed, however, because the term "malicious" does not mean "intent to cause harm;" instead, it has been defined as "characterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will."[9] As such, the amendment would have clarified that the legislation would apply only to persons who are conveying ill will, not simply those joking in bad taste.

Another problem with the existing intent standard is that it does not require the defendant to know that the information conveyed was false or misleading. As it is written, the bill could lead to the prosecution of a person who intended to convey information but did not intend for it to be "false or misleading." For that reason, we hope the bill can be clarified to state that the person must know the information is false or misleading.

II. MANDATORY RESTITUTION

---

[7]In one case, a firefighter in Lycoming County, Pennsylvania, told his colleagues that powder had spilled from an envelope he had opened at home; a few weeks later, he was in court facing the felony criminal charge of creating a disturbance. Martin Kasindorf & Toni Locy, *Anthrax Hoaxes Persist Despite Arrests*, USA TODAY, Nov. 6, 2001, at 1A. In addition, state prosecutors have filed felony disorderly conduct charges against a Cook County, Illinois prosecutor who put on a colleague's desk an envelope filled with sugar and bearing the return address of a defendant in that colleague's case. Richard Roeper, *Anthrax-Joke Epidemic is Real National Illness*, CHICAGO SUN-TIMES, Nov. 5, 2001, at 11. Finally, Kentucky State Police are conducting a criminal investigation of Bourbon County Sheriff John Ransdell, who "slipped envelopes containing crushed aspirin onto courthouse employees' desks," purportedly to test employee preparedness. Laura Yuen, *Sheriff Target of Criminal Inquiry over Aspirin He Put in Envelopes*, LEXINGTON HERALD LEADER, Nov. 1, 2001, at A1.

[8]Roeper, *supra*; Valerie Schremp, *Fired Worker at GM Plant is Charged in Prank Involving the Anthrax Scare*, ST. LOUIS POST-DISPATCH, Oct. 24, 2001, at A4.

[9]BLACK'S LAW DICTIONARY 958 (6th ed. 1990).

We also are concerned that because the bill imposes mandatory restitution for criminal violations and, therefore, eliminates judicial discretion in making sentencing decisions and discriminates against those with lower incomes. More specifically, H.R. 3209 requires judges to order those convicted of a criminal hoax offense to reimburse any party – likely to be the government – for any expenses incurred due to the hoax.[10]

The first problem with this provision is that, as with mandatory minimum penalties, it removes judges from the sentencing process and thereby strips their discretion. Under current law, whether a defendant should be required to make restitution generally is left to the discretion of the sentencing judge.[11] In fact, leaving judges the discretion to make sentencing decision has been a prized characteristic of our judicial system and prior congressional actions to strip that away have been criticized.[12] Unfortunately, this provision prohibits judges from making case-by-case determinations about whether an individual should be required to reimburse the government or any other party, thus subjecting all defendants to a one-size-fits-all punishment scheme.

Moreover, mandatory restitution discriminates on the basis of economic status, in that

---

[10]H.R. 3209 § 2(a) ("[t]he court, in imposing a sentence on a defendant who has been convicted of a [criminal hoax offense], *shall* order the defendant to reimburse any party incurring expenses incident to any emergency or investigative response to that conduct, for those expenses. A person ordered to make reimbursement under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered to make reimbursement under this subsection for the same expenses.") (emphasis added). The provision was tempered by an amendment offered by Rep. Bobby Scott (D-VA) ensuring that reimbursement orders would be civil, not criminal, judgments, so that those unable to pay would not go to jail.

[11]*See, e.g.*, 18 U.S.C. § 3663.

[12]*See, e.g.*, Lucy Quinlivan, *Judge Quits Case over Sentencing; Federal Mandate Cited in Drug Case*, SAINT PAUL PIONEER PRESS, Jan. 20, 2001, at 1B (Federal judge removes himself from case rather than complying with U.S. Court of Appeals order to impose harsher sentence in line with Federal Sentencing Guidelines); Michael R. Bromwich, *Put a Stop to Savage Sentencing*, WASH. POST., Nov. 22, 1999, at A23 (op-ed); Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES, Nov. 21, 1998, at A12 (Supreme Court Justice Stephen G. Breyer criticizing the Federal Sentencing Guidelines and "calling for Federal judges to regain some of their traditional discretion to make the punishment fit the crime."); Benjamin Weiser, *Judge Has His Own Take on Sentencing Formulas*, N.Y. TIMES, Sept. 14, 1997, at 1-39 (Federal judge sometimes imposes lighter or harsher sentences than the Federal guidelines call for depending on the circumstances of each case).

those with lower incomes would be less likely to be able to comply with reimbursement orders.[13] As a result, defendant with lower incomes would be more likely to fall irreversibly into the justice system, from the initial criminal conviction to a reimbursement order and then possibly to a contempt of court citation for not providing reimbursement.[14]

John Conyers, Jr.
Bobby Scott
Sheila Jackson Lee
Maxine Waters

[13]*See, e.g.*, Letter from Ira Glasser & Laura Murphy Lee, ACLU, to the Honorable Henry Hyde, Chairman, House Comm. on the Judiciary (Jan. 27, 1995).

[14]Pursuant to an amendment adopted at the Committee markup and offered by Reps. Bobby Scott (D-VA) and Lamar Smith (D-TX), the reimbursement order would be treated as a civil, not criminal, judgment.